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June 28, 2004

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Dear Chairman Powell:

I am writing because I am gravely concerned about your impending decision in the 800 MHz proceeding. As you know, Nextel's demand that the FCC bypass the public auction process and award it immensely valuable 1.9 GHz spectrum (worth *at least* $5 billion) is injurious to the wireless industry and especially to Verizon. Given our special need for that spectrum and our demonstrated readiness to bid on it, we have told you that, *as between* Nextel's proposal and the CTIA compromise by which 2.1 GHz spectrum would be sold to Nextel, we obviously would prefer the latter.

However, I have consistently been of the view that Congress must resolve this matter and that the FCC would violate the law if it were to proceed with either plan. As we have previously explained, adopting either plan would contravene the requirements of the Communications Act of 1934, as amended, concerning the Commission's disposition of public spectrum. More than that, proceeding on this course would place the Commission's members themselves in direct violation of federal laws governing the personal accountability of federal officials for the disposition of federal resources. While the Commission is familiar with the Communications Act, I believe it may not be as well acquainted with these latter proscriptions, some of which are criminal in nature. My purpose in writing is to urge the Commission to give these fiscal accountability laws the most careful and serious consideration.

At the outset, the regulatory history of Nextel's 800 MHz spectrum bears repeating. Nextel originally acquired its spectrum in the 800 MHz band for the limited purpose of private, two-way radio communications. Due to that limitation on use, the price that Nextel paid for the spectrum in secondary markets was relatively low. Nextel subsequently petitioned the Commission for a waiver to convert its use of the spectrum to commercial cellular operations and, in deploying its iDEN technology, expressly pledged that public safety systems should be "accorded full and continuing protection" where interference arises. *Petition for Waiver of Fleet Call, Inc.*, FCC File

No. LMK-90036 at A-12 ¶¶ 31, 33-34 (Apr. 15, 1990). While building a successful business on its expanded use of this spectrum, Nextel has increasingly caused interference to public safety operations but failed to take the measures necessary to put an end to this interference. As we have explained, the Commission undoubtedly possesses the power to simply order Nextel to stop the harmful interference it is causing to public safety's communications. *See* Letter from R. Michael Senkowski, Wiley Rein & Fielding LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket 02-55 (Apr. 7, 2004) (attaching white paper entitled *The Federal Communications Commission Lawfully May Order Nextel To Pay The Costs Of Relocating Incumbent 800 MHz Licensees*).

In the wake of the September 11 attacks, Nextel embarked on what has been called "an audacious strategy" to link public safety concerns over the interference it was causing with its desire to obtain more robust spectrum without having to bid for it. Jesse Drucker & Anne Marie Squeo, *Interference Call: Nextel's Maneuver for Wireless Rights Has Rivals Fuming*, WALL ST. J., Apr. 19, 2004, at A1. Nextel launched a massive lobbying campaign to pressure the FCC into granting it a block of new 1.9 GHz spectrum – spectrum far more valuable and capable than its existing spectrum, and which would allow it to expand its business into new 3G services it can not currently provide. Nextel has proposed that "[i]n return" for the spectrum, it would make the "substantial contributions" of consolidating its operations in the 800 MHz band, giving up 5MHz of its existing spectrum to be added to public safety's inventory, and setting up fund of at least $850 million to pay for the relocation costs of public safety agencies. Nextel Press Release, "Critical Public Safety Needs Must Be Addressed" (Apr. 22, 2004) ("Nextel Press Release"), *available at* http://news.morningstar.com/news/BW/M04/D22/20040422006060.html.

Offered the chance for a minimum of $850 million *and* an additional 5 MHz of spectrum, some public safety groups have supported this plan, though others have not. Thus has a private firm's grab for valuable public spectrum been dressed in the garb of a public safety initiative. While Verizon stands second to none in its commitment to public safety, there are legal ways to accomplish the goal of preventing interference with these important licensees and there are illegal ones. The Nextel plan – and its variants – are illegal ones.

Two different sets of laws clearly prohibit the Nextel plan. The first is the source of the Commission's organic authority, the Communications Act, which delegates to the agency certain powers to manage radio spectrum. As we have consistently maintained, the Communications Act confers upon the Commission no authority whatsoever to award the 1.9 GHz spectrum to Nextel outside the competitive bidding process mandated by Congress. *See* Letter from R. Michael Senkowski, Wiley Rein & Fielding LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket 02-55 (Apr. 6, 2004) (attaching white paper entitled *The Federal Communications Commission Has No Authority To Award Spectrum To Nextel Through A Private Sale*).

Congress spelled out its purposes in mandating public auctions: (1) to capture the full value of radio spectrum, a public resource, for the benefit of the American people, *see* 47 U.S.C. § 309(j)(3)(c) (directing Commission to achieve "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use"); (2) conversely, to avoid conferring windfall upon private parties, *see id.* (Commission must consider "avoidance of unjust

enrichment through the methods employed to award uses of [the public spectrum] resource"); and (3) to allocate spectrum to its highest and best use, as determined by the highest qualified bidder, not the squeakiest political wheel, *see Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1405 (D.C. Cir. 1995) (explaining that because "the party able to use the license most efficiently will be able to bid the most," a system of competitive bidding ensures that "the license will end up in the hands of the firm best able to develop its potential"), *cert. denied*, 519 U.S. 823 (1996). Adoption of the Nextel plan would eviscerate these core legislative mandates.

But the purpose of this letter is not to repeat the legal infirmities of the Nextel plan under the FCC's organic statute, which we and other commenters have already well documented, but to focus your attention on a second set of laws that prohibits Nextel's proposed transaction. These laws are very different in nature from the Communications Act, but of greater consequence. They are the federal laws governing the accountability of government officials in their disposition of federal funds and other valuable public resources: the Anti-Deficiency Act ("ADA"), 31 U.S.C. § 1341(a)(1)(B); the Miscellaneous Receipts Act ("MRA"), 31 U.S.C. § 3302(b); and Section 641 of the criminal code, 18 U.S.C § 641.

Broadly, these laws are animated by one essential constitutional principle: Congress, and Congress *alone*, possesses the power to determine how public resources are to be expended or applied. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.") Individual government officials simply are not free to expend public resources under their stewardship in support of activity that they themselves deem to be in the public interest. It is for Congress, not a given official, to define the legitimate government interests that warrant the expenditure of public funds or the disposition of federal resources.

Congress has protected its power of the purse through a range of statutory provisions, including criminal laws, three of which are relevant here. First, the ADA subjects to felony criminal liability any "officer or employee of the United States Government" who "involve[s] [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). Second, the MRA obliges "an official or agent of the Government receiving money for the Government from any source" to "deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). An official who violates the MRA "may be removed from office" and "may be required to forfeit" the moneys not deposited. *Id.* § 3302(d). Finally, Section 641 of Title 18 imposes criminal liability on "[w]hoever . . . without authority , sells, conveys, or disposes of any . . . thing of value of the United States or of any department or agency thereof." 18 U.S.C. § 641.

It is no accident that Congress chose to employ the criminal law to police the fiscal accountability of public officials. Congress well understood that stewards of public resources could be exposed to relentless pressures to convert those resources to private gain. It therefore took stern measures, and aimed them directly at the officials themselves, to ensure that they would not succumb to these pressures and instead remain true to the public trust.

Enclosed is a memorandum by Mr. Charles J. Cooper, former Assistant Attorney General of the Office of Legal Counsel, the division of the Department of Justice responsible for advising agencies on compliance with the ADA and the MRA. As he explains, the plan you are considering is a patent violation of these laws.

It is indisputable that the FCC has no authority to expend federal dollars to pay for the relocation costs of either public safety agencies or private parties such as Nextel. Thus, the FCC could not directly provide financial support for these relocation costs. It is critical for the Commission to understand that *the ADA not only prohibits the agency from making such payments directly but also condemns any transaction that in substance accomplishes the same result*. The classic example of such a prohibited arrangement is one in which the agency, instead of making the payment itself, simply transfers something of value to an intermediary as part of a transaction in which the intermediary undertakes to make the payments the government cannot.

By design, these statutes cannot be circumvented by elevating form over substance. As the Comptroller General has repeatedly emphasized, the ADA is addressed to the substance of a transaction: the labels and characterizations that the agency might apply are irrelevant, and it is the underlying economic realities of the transaction that govern. *See, e.g.*, *To the Secretary of the Interior*, 41 Comp. Gen. 493 (1962); Kate Stith, *Power of the Congress' Power of the Purse*, 97 YALE L.J. 1343, 1371-72 (1988). Thus, the ADA is a law of broad reach that extends to any contrivance that in substance converts a federal resource to support activity that the agency is not authorized to fund.

A 1963 decision of the Comptroller General involving the National Zoo is a good example of this point. *See To the Sec'y, Smithsonian Inst.*, 42 Comp. Gen. 650 (1963). There, the Zoo proposed to grant a permit to a private non-profit organization to install a coin-operated audio tour system. The non-profit planned to use the proceeds to finance a teacher training program and guidebook to the Zoo. Consequently, the Zoo expended no funds itself, but simply issued a permit. The Comptroller ruled that this arrangement violated both the ADA and the MRA. Just as the Zoo could not fund these charitable projects directly, it also could not do so by granting a valuable permit to a private party so that the party could then use that value to fund those efforts.

Here, the substance of the Nextel transaction could not be clearer. Under its plan, the government is to transfer to Nextel spectrum worth at least $5.3 billion in return for, among other things, Nextel's promise to establish a fund of $850 million to cover the costs of relocating the operations of public safety licensees to different frequencies. In addition, the current proposal reportedly contemplates that government would compensate Nextel for its *own* relocation costs. Nextel itself has described the Commission's grant of spectrum as reimbursement for Nextel's payment of relocation costs. *See* Nextel Press Release. It has also described its payment of those costs as a "contribution" for which the government must compensate it with additional spectrum – in other words, as something for which they deserve "credit" for consideration otherwise due the government. *See id.* Under either formulation, this transaction is a facial violation of both the ADA and the MRA: it is manifest that the economic value of the spectrum is being converted into cash payments to third parties that the Commission is legally barred from making directly. Put

another way, it is obvious that Nextel would not make the payments to public safety agencies if it were not recovering that value through the grant of public spectrum.

Indeed, we need not puzzle over the Nextel proposal's evasive purpose and substance: Nextel has been open about it. In its April 22, 2004, press release, Nextel frankly acknowledged that it is getting around the fact that the FCC could not directly fund public safety's needs. So Nextel explicitly proposes to accomplish these payments indirectly, through a transaction contrived to compensate Nextel with spectrum in exchange for Nextel's agreement to make payments that the Commission favors but is legally forbidden to make. Nextel makes no effort to disguise the scheme, proclaiming that it is "committed to funding public safety" but that, as Nextel puts it, "[i]n return for its substantial contributions, Nextel must be made whole with replacement spectrum." Nextel Press Release. Proposals to circumvent statutory restrictions on agency authority are not unfamiliar. Rarely, however, are such schemes openly detailed in a press release.

Nor would it matter whether an intermediary's payments are formally characterized, as Nextel has already done on the record here, as credits or reimbursement for payments that the government could not otherwise make. Even if the government were to disclaim the payments as a form of consideration or reimbursement, the grant of the license to Nextel would still violate the ADA so long as it is conditioned in any way – either expressly or implicitly – on Nextel's payments for the relocation costs of third parties. To determine whether the transaction is in fact so conditioned one need only ask this: would the government award the spectrum licenses to Nextel absent Nextel's relocation payments or, conversely, would Nextel make the payments absent the government's award of the licenses? Nextel has already answered unequivocally: "We are not doing this for charity." Yuki Noguchi, *Nextel, FCC in Standoff Over Prime Cellular Spectrum*, WASH. POST, May 7, 2004, at E01 (quoting Lawrence R. Krevor, Nextel's Vice President of Government Affairs).

From an economic standpoint, Nextel would not make the payments to public safety without, as it says, being "made whole" by acquiring the value of the 1.9 GHz spectrum. In other words, if Nextel is willing to give $850 million to public safety agencies to obtain the spectrum, it should also be willing to pay that money to the government to obtain the spectrum. The only reason it is channeling that money to third parties, rather than to the Treasury, is to accomplish what it perceives to be the Commission's purpose – to ensure funding for public safety; but Congress has not authorized the Commission to expend any funds to that end. As Mr. Cooper's memorandum explains, it is this dimension of the arrangement that violates not only the ADA but the MRA as well. But for the plan's diversionary purpose, those sums paid to public safety agencies would be payable to the United States as consideration. They are thus proceeds or receipts that would otherwise be due the United States for the transfer of spectrum.

The legal infirmities of the Nextel plan are so plain that I am confident that, if you were to ask your legal advisors for their *best judgment* on the question whether the plan was legal under the ADA, the MRA, and Section 641, they would say it was not. There is no room for doubt. At a minimum, they would be constrained to advise you that there is a strong likelihood that the plan violates these statutes. And how could it be otherwise? If these statutory mandates

could be evaded through such transparent contrivances, what would remain of Congress' constitutional authority over the public fisc?

There is a fundamental difference between these prohibitions of criminal law and the constraints in an administrative agency's authorizing statute. There are times when agencies, including the FCC, advance strained "interpretations" of their authorizing statutes and take the "litigation risk" of such action. But when confronting criminal provisions such as these, that approach is illegitimate. Public officials (apart from prosecutors and judges, acting in their official capacities) have no authority to interpret either the ADA, the MRA, or Section 641; to the contrary, the very purpose of these provisions is to restrain the actions of these individuals, and the checks the statutes impose directly on them are necessarily impervious to an agency's evasive rationalizations. While these proscriptions may apply to an official's public acts, they seek to hold the official accountable in his personal, individual capacity. Given the duties of federal office, if a government official understands that a particular course of action involves a substantial probability of criminality, the fact that he may have a "colorable" argument to the contrary cannot justify proceeding on that course. Litigation risk is irrelevant; it is a question of fidelity to duties as an officer of the United States. He is thus bound to stay his hand until the matter is resolved by one with authority to do so.

As Mr. Cooper describes in his memorandum, the requirements of these laws are not quaint anachronisms but are taken extremely seriously. For that reason, there are well-established and well-worn avenues by which agencies may seek and obtain authoritative legal guidance on the application of these requirements. The Comptroller General is regularly consulted on the meaning and scope of federal budgetary statutes, and the Supreme Court has cited his "repeated[] rul[ings]" as persuasive authority on the meaning of the ADA. *Hercules Inc. v. United States*, 516 U.S. 417, 427 & n.10 (1996). In addition, the Office of Legal Counsel is available to all agencies to provide authoritative advice.

Given the grave legal problems that indisputably exist, the magnitude of the proposed transaction, and the disruption that retroactive invalidation of the Nextel plan would cause, I respectfully suggest that the Commission, before proceeding any further in this matter, obtain guidance from the Comptroller General on the lawfulness of the plan. It is my understanding that senior members of both chambers of Congress will be asking the Comptroller General for his opinion on this matter. Certainly, you could facilitate the prompt receipt of that advice. It is difficult to conceive of a legitimate reason why this prudent course of action should not be taken.

At the end of the day, I believe that the FCC cannot unilaterally take the steps proposed. This matter belongs in the Congress, which alone can make provision for the proper, adequate, and secure funding for the needs of public safety. Apart from the need to cure the legal flaws present on this record, public policy concerns dictate a congressionally-fashioned solution. Because the Nextel plan is in fact an end-run around limitations on FCC authority, it necessarily results in a bizarre administrative structure whereby a private commercial firm controls the funding available to public safety agencies for their communications needs, sitting in judgment on the legitimacy and adequacy of those agencies' expenditures. Surely the critical homeland security functions

performed by these agencies should instead be funded and administered by federal officials accountable to the Congress and the public.

Finally, I ask you to consider the net effect of a Commission decision that withdraws spectrum from the public auction process, while at the same time allowing those scrambling to obtain spectrum to get credit for promising interest groups a "cut of the action." The result is a political free-for-all in which those who can best manipulate the political system, and muster up the most attractive political constituencies, are able to extract the public spectrum. This is the antithesis of the orderly, objective, transparent, and economically-driven process that Congress instructed the Commission to follow.

Sincerely yours,

William P. Barr

Enclosure
cc: The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Kevin J. Martin
The Honorable Jonathan S. Adelstein

Cooper & Kirk

Lawyers
A Professional Limited Liability Company

Memorandum

TO: **Steven E. Zipperstein**
Vice President -- Legal & External Affairs,
General Counsel and Secretary
Verizon Wireless

DATE: **June 28, 2004**

RE: **The Federal Communications Commission's Proposed Sale of Spectrum to Nextel Communications**

You have asked for the views of this firm concerning the legality of a proposed transaction between the Federal Communications Commission ("FCC" or "Commission") and Nextel Communications ("Nextel") for the sale of federally controlled radio spectrum, as described below. For the reasons that follow, we believe that the proposed sale would violate Federal laws, including criminal provisions, governing the stewardship and disposition of public funds and resources.

EXECUTIVE SUMMARY

Nextel, the Nation's sixth-largest wireless service provider, carries its communications on frequencies in the 800 MHz band that are interleaved with the frequencies utilized by police, fire, and other public safety providers. Unfortunately, Nextel's service often interferes with emergency communications. The Commission has solicited comments from the public on how to remedy this problem, and Nextel has made a proposal that, according to published reports, a majority of the Commission is prepared to accept.

Under the Nextel proposal, the FCC would license to Nextel ten MHz of federally controlled radio spectrum in the 1.9 GHz band in a bilateral transaction, rather than award the license to the highest bidder at a public auction, as prescribed in 47 U.S.C. § 309(j)(1). In exchange, Nextel would agree (1) to a

consolidation and relocation of its operations within the 800 MHz band; (2) to surrender some of its existing -- and far less valuable -- spectrum at 800 MHz for use by public safety agencies; and (3) to establish a fund of at least $800 million to cover the costs of relocating the operations of public safety licensees to different frequencies within the 800 MHz band. Obviously, by crediting this relocation fund to Nextel as part of the consideration for the license, the FCC itself would in effect be funding the resulting transition costs within the 800 MHz band.

We believe that the Nextel proposal, if implemented, would violate both the Anti-Deficiency Act, 31 U.S.C. § 1341, and the Miscellaneous Receipts Act, 31 U.S.C. § 3302, by simultaneously expanding the FCC's appropriations and expenditures well beyond those authorized by Congress and depriving the Treasury of revenue for a valuable public asset that Congress has determined should be auctioned to the highest responsible bidder for the benefit of the American people. *See* 47 U.S.C. § 309(j)(3)(c) (identifying legislative aims of "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource").

This Memorandum first outlines the relevant background and terms of the proposal, as we understand them. It then offers a basic exposition of the relevant statutory framework before analyzing, in light of prior decisions issued by the Attorney General and the Comptroller General, the legality of Nextel's proposal.

BACKGROUND

Nextel was initially licensed to transmit on frequencies in the 800 MHz band prior to the passage of Section 309(j)(1), at a time when that spectrum was used primarily for two-way radio services. After petitioning the FCC for a waiver of certain license limitations, Nextel changed its network architecture to provide cellular-type services and began to market its service on this basis. For some years, Nextel obtained additional 800 MHz spectrum by purchasing it in the secondary market. Following Congress' grant of auction authority to the FCC, however, Nextel persuaded the Commission to hold an auction for the remaining 800 MHz spectrum. In that auction, Nextel purchased the spectrum relatively cheaply because, among other things, the spectrum was interleaved with frequencies utilized by state and local public safety authorities and Nextel was the dominant license holder of the spectrum.

Under FCC regulations, Nextel was obliged not to create harmful interference in the 800 MHz band and to remedy any such interference if it

arose.[1] The Commission also possessed regulatory authority to order Nextel to take whatever steps might be necessary to clear up any interference in the 800 MHz band caused by its operations.[2] Moreover, Nextel's waiver request represented that Nextel would not cause any interference to other users in the band and even noted the importance of protecting adjacent public safety licensees from interference.[3] Nevertheless, in-band interference occurred and persisted, giving rise to complaints among public safety authorities that the interference compromises the effectiveness of their critically important operations.

After September 11, 2001, Nextel enlisted various organizations representing state and local authorities to lobby the FCC to adopt something along the lines of the instant proposal. Specifically, Nextel proposed to abandon its existing interleaved spectrum in the 800 MHz band and relocate its operation into a contiguous -- and thus much more valuable -- band of spectrum within the 800 MHz band.[4] Portions of the 800 MHz spectrum that Nextel had previously occupied would thus be reserved for use by state and local public safety authorities, as well as other displaced private wireless incumbents. Nextel also proposed to take affirmative measures to remedy the interference that state and local public safety authorities had previously encountered. Nextel would

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[1] *See* 47 C.F.R. § 90.403(e) ("Licensees shall take reasonable precautions to avoid causing harmful interference. This includes monitoring the transmitting frequency for communications in progress and such other measures as may be necessary to minimize the potential for causing interference.").

[2] *See* 47 C.F.R. § 90.173(b) ("Licensees of stations suffering or causing harmful interference are expected to cooperate and resolve this problem by mutually satisfactory arrangements. If the licensees are unable to do so, the Commission may impose restrictions including specifying the transmitter power, antenna height, or area or hours of operation of the stations concerned.").

[3] Petition for Waiver of Fleet Call, Inc., FCC File No. LMK-90036, at A-12 ¶ 31, A-12 ¶¶ 33-34 (Apr. 15, 1990).

[4] Verizon Wireless has presented evidence to the Commission demonstrating that the net value (of its initial proposal) to Nextel of obtaining contiguous 800 MHz spectrum in lieu of the spectrum Nextel had previously occupied would be $2.3 billion, even accounting for the fact that it would receive slightly fewer channels of spectrum than it currently occupies. Its latest proposal, whereby Nextel has offered to turn in an additional 2 MHz of 800 MHz spectrum while retaining the 4 MHz of 900 MHz spectrum it initially offered, still would lead to a windfall of better than $1.2 billion.

establish a fund of at least $800 million[5] to cover the transition costs associated with relocating public safety agencies (and other displaced incumbents) to different frequencies within the 800 MHz spectrum and otherwise obviating the prior interference. In return for these measures, the FCC would issue a license for 10 MHz of contiguous radio spectrum in the 1.9 GHz band. This spectrum would be national in scope and would be immensely valuable, much more so than the consideration to be provided by Nextel in return.[6]

Nextel has been remarkably candid in acknowledging that its proposal was consciously designed to circumvent the law requiring that spectrum be auctioned. As Nextel publicly stated in a press release on April 22, "auction receipts could not legally be used [by the Commission] to benefit the public safety community." *See* Nextel Release, *Critical Public Safety Needs Must Be Addressed*, April 22, 2004 (attached as Exhibit A). Accordingly, auctioning the 1.9 GHz spectrum to the highest bidder "would do nothing to achieve the FCC's objectives -- solving the critical public safety problem, providing much-needed additional spectrum for public safety *and doing so at no cost to the government*." *Id.* (emphasis in original). So Nextel's proposal explicitly seeks to achieve the FCC's objectives indirectly, through a transaction contrived to allow the Commission to award Nextel a valuable spectrum license in return for Nextel's agreement to fund policies that the Commission favors but is unauthorized to fund itself. Nextel's proposal expressly commits it "to funding public safety and private wireless relocation costs and surrendering spectrum rights to facilitate the realignment process . . . ." *Id.* And, as Nextel puts it, "*[i]n return for its substantial contribution, Nextel must be made whole with replacement spectrum*." *Id.* (emphasis in

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[5] Although Nextel initially proposed to deposit $850 million in the fund, the FCC has yet to agree upon the precise amount. Reportedly, this number may run as high as $1.5 billion.

[6] The 1.9 GHz spectrum, unlike the 800 MHz spectrum previously occupied by Nextel, is capable of carrying high-speed data nationwide, and would allow Nextel to compete with the existing benchmark providers of such service. Verizon Wireless has submitted evidence to the Commission valuing this spectrum at $5.3 billion, and consistent with this valuation, Verizon Wireless has represented to the FCC that, should it put this spectrum up for auction in accordance with 47 U.S.C. § 309(j), Verizon Wireless is prepared to open the bidding at $5 billion. While the final terms of the deal have not yet been made public, it is our understanding that, notwithstanding Verizon's willingness to open bidding at $5 billion for the 1.9 GHz spectrum, the total price to Nextel will be substantially less and/or will "credit" Nextel for a variety of "contributions" that either do not merit credits or are vastly overestimated. Ex parte presentation of Verizon Wireless, WT Dkt. No. 02-55 (filed June 9, 2004).

original). In other words, Nextel insists on being "made whole" with a license for an immensely valuable block of nationwide spectrum, without having to bid for it against other interested carriers.[7]

Recent news reports indicate that the Commission is apparently prepared to vote to accept Nextel's proposal. *See* Yuki Noguchi, *FCC Chairman Sides With Nextel on Disputed Airwaves*, WASH. POST, June 24, 2004, at E1 (attached as Exhibit B). In keeping with Nextel's proposal, funds on the order of $800 million for the public safety licensee's transition costs would be set aside by Nextel and credited toward the purchase price of the license. The FCC also apparently will determine that Nextel's relocation of its 800 MHz spectrum into contiguous spectrum that would not interfere with state and local authorities would somehow result in a net *loss* to Nextel that will be applied as a credit toward the purchase price of the 1.9 GHz spectrum.

In short, under the proposed transaction, a substantial part of the purchase price for the license will consist of a credit for funds spent by Nextel to cover the relocation costs of public safety and other licensees, and a further credit to compensate Nextel for the "loss" arising from its own relocation to more valuable contiguous spectrum in the 800 MHz band.[8]

Were the Commission to implement Nextel's scheme, its actions would plainly violate the statutory requirement that spectrum be licensed at auction. But that is not all. More importantly, accepting Nextel's proposal would place the Commission's members themselves in direct violation of federal budgetary laws governing the accountability of government officials for the disposition of federal property, including laws that carry criminal penalties.

RELEVANT STATUTES

Chapter 33 of Title 31 contains both the Anti-Deficiency Act and the Miscellaneous Receipts Act. The Anti-Deficiency Act provides in relevant part:

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[7] We hasten to note that even if the FCC were authorized to award the spectrum license to Nextel in a bilateral sales transaction, rather than offer it at public auction, the terms of the proposed transaction would nonetheless violate the Anti-Deficiency Act and the Miscellaneous Receipts Act, for the reasons stated herein.

[8] This Memorandum focuses on the legality of the part of Nextel's proposal calling for establishment of a $800 million fund to cover the relocation costs of public safety licensees and other incumbents. The legal analysis, however, would be the same with respect to any further credit provided by the FCC to compensate Nextel for its own costs for relocating to contiguous spectrum in the 800 MHz band.

> (a)(1)(A) An officer or employee of the United States Government . . . may not --
>
> (a) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
>
> (b) involve . . . [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341. A knowing and willful violation of subsection (a) is subject to criminal penalties of up to two years in prison or a $250,000 fine. 31 U.S.C. § 1350. The Miscellaneous Receipts Act includes a closely related prohibition:

> Except as provided in Section 3718(b) of this Title,[9] an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

31 U.S.C. § 3302(b). Any Government official who violates this provision "may be removed from office." 31 U.S.C. § 3302(d).

Congress has prescribed specific procedures by which the FCC should issue initial licenses for valuable radio spectrum to private users: "If . . . mutually exclusive applications are accepted for any initial license . . . then, except as provided in paragraph (2),[10] the Commission shall grant the license . . . to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection." 47 U.S.C. § 309(j)(1). Congress has also specifically instructed the FCC that "all proceeds from the use of a competitive bidding system under this subjection shall be deposited in the Treasury in accordance with Chapter 33 of Title 31." 47 U.S.C. § 309(j)(8).

DISCUSSION

The prohibitions of the Anti-Deficiency Act and the Miscellaneous Receipts Act operate in tandem to guard Congress' power of the purse and to vindicate the Constitutional injunction that "No Money shall be drawn from the

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[9] Section 3718(b) authorizes the Attorney General to retain private counsel to collect funds owed to the United States.

[10] Paragraph (2) exempts from the public auction requirement licenses issued to public safety agencies, certain digital television providers, and public radio and television stations.

Treasury, but in Consequence of Appropriations made by Law." U.S. CONST., Art. I, § 9, cl. 7. The Anti-Deficiency Act prohibits the expenditure of public funds absent or exceeding a legislative appropriation, and the Miscellaneous Receipts Act provides that all monies received by any agency of the Government, from whatever source and in whatever form, are public funds that are subject to the restrictions of the Anti-Deficiency Act.

The proposed transaction between Nextel and the FCC violates both the Anti-Deficiency Act and the Miscellaneous Receipts Act by utilizing a part of the consideration provided by Nextel for the 1.9 GHz spectrum to fund at least $800 million in transition costs of the public safety agencies that will be changing frequencies within the 800 MHz band. The proposed transaction likewise violates these provisions to the extent that the spectrum license would be awarded to Nextel for substantially below market consideration (even assuming that the funds provided for the transition costs of the public safety agencies are legitimately counted as a credit toward Nextel's purchase). Finally, the proposed bilateral transaction would also violate the specific statutory requirement that spectrum be sold at public auction.

I. THE FCC MAY NOT PROVIDE A VALUABLE LICENSE TO NEXTEL IN EXCHANGE FOR NEXTEL'S AGREEMENT TO FUND THE TRANSITION COSTS OF PUBLIC SAFETY AGENCIES.

By permitting the diversion to public safety agencies of some of the consideration to be paid by Nextel for the 1.9 GHz spectrum, the FCC is depriving the federal Treasury of monies that would otherwise flow directly to it -- both the amount diverted to public safety agencies and any additional total compensation that the FCC would realize in an auction. This violates the plain instruction of the Miscellaneous Receipts Act that the agency "shall deposit the money in the Treasury as soon as practicable *without deduction for any charge or claim*." 31 U.S.C. § 3302(b) (emphasis added).

Moreover, the diversion to the public safety agencies of monies due to the Treasury effectively expends funds from the Treasury that have not been appropriated by Congress. It thus violates the Anti-Deficiency Act by "authoriz[ing] an expenditure . . . exceeding an amount available in an appropriation." 31 U.S.C. § 1341(a)(1)(A). The fact that the FCC proposes to structure the transaction to divert the funds to its chosen project before they reach the Treasury does not alter the result. As the Comptroller General opinions discussed below make clear, it is the economic substance of the transaction, not the form, that controls. The FCC's proposed transaction with Nextel is substantively indistinguishable from one in which Nextel paid the full consideration to the FCC, and the FCC then expended the funds on the public

agency transition costs rather than depositing them in the Treasury, notwithstanding the absence of an appropriation.

Simply put, the proposed transaction would enable the FCC to finance an activity that *it* has deemed worthy, using valuable radio spectrum that belongs to the public, notwithstanding Congress' express instruction that such spectrum is to be auctioned to the highest bidder and the proceeds deposited in the Treasury. Indeed, Nextel itself has acknowledged in a recent submission to the FCC "that auction receipts could not legally be used to benefit the public safety community" without the requisite appropriation from Congress. Nextel, April 22, 2004 Press Release: *Critical Public Safety Needs Must Be Addressed*. As the Attorney General, citing a precursor to the current Anti-Deficiency Act, explained more than a century ago in rejecting a Government proposal to use private contributions to fund the Army: "[I]t is expected that Congress will furnish the Executive authority with sufficient appropriations for that purpose. In the absence of such appropriations, . . . the funds should [not] be sought elsewhere . . . . The maintenance of an army without a legislative appropriation for that purpose would place the executive authorities in a[n undesirable] relation to those furnishing the means." *Opinion of Hon. Charles Devens re Support of the Army*, 15 Op. Att'y Gen. 209 (1877).

So too here. No matter how fair the exchange or how meritorious the project, the necessary reality is that the FCC is expanding its own spending authority beyond that provided by Congress in the form of direct appropriations, by offering a valuable Government benefit to induce private expenditures to fund a governmental initiative. Under the clear language of the Anti-Deficiency Act and the Miscellaneous Receipts Act, the Nextel proposal is unlawful. Any doubt on this point is removed by consideration of a long line of Comptroller General opinions addressing closely analogous proposals. *Cf. Hercules Incorporated v. United States*, 516 U.S. 417, 427 & n.10 (citing "repeated[] rul[ings]" of the Comptroller General as authoritative with respect to the Anti-Deficiency Act).

A. General Policies Furthered by the Anti-Deficiency and Miscellaneous Receipts Acts.

As early as 1883, Attorney General Phillips considered a predecessor to the Miscellaneous Receipts Act, and explained that "[s]ince the year 1831, when the provisions of Section 4751 were first enacted, it has become the general policy of the United States to require that monies collected in behalf of the United States shall be paid into the Treasury. . . . So that what is meant is, that so much of the monies as is collected *for the United States* shall be paid into the Treasury, and not, as theretofore, *to the Secretary*." 17 Op. Att'y Gen. 592 (1883) (emphases in original).

This understanding has not changed. The Comptroller General made the same point in a 1996 opinion: "Unless otherwise authorized, agencies must deposit all funds received for the use of the United States in a general fund of the Treasury as miscellaneous receipts. Failure to do so constitutes an improper augmentation of the agency's appropriation." *Matter of: Securities and Exchange Commission – Reduction of Obligation of Appropriated Funds Due to a Sublease*, 96-2 Comp. Gen. Proc. Dec., P26, (1996) (citation omitted). The Comptroller General further ruled that the SEC's use of payments from a sublessor to reduce its obligation of appropriated funds "improperly augments its appropriation and the SEC should deposit the reduction in its rental payments into the Treasury as miscellaneous receipts." *Id*.; *see also Matter of: Tennessee Valley Authority – False Claims Act Recoveries*, 2000 Comp. Gen. Proc. Dec. P41 (2000) ("In the absence of specific statutory authority, an agency must deposit monies received for the use of the United States into the general fund of the Treasury as miscellaneous receipts.").

Just as the Miscellaneous Receipts Act safeguards Congress' authority over public revenues by insisting that they be deposited into the Treasury, the Anti-Deficiency Act ensures that Congress, by way of its direct appropriations, has ultimate control over what obligations and expenditures are made on behalf of the United States and for what purposes. For instance, the Office of the Comptroller General "has long held that, absent specific statutory authority, indemnity provisions which subject the United States to contingent and undetermined liabilities contravene the Anti-Deficiency Act." *Matter of: Project Stormfury – Australia – Indemnification for Damages*, 59 Comp. Gen. 369 (1980); *see also In the Matter of Proposed Assumption of Real and Personnel Property Risk Owned by Certain Contractors*, 54 Comp. Gen. 824 (1975); *Comptroller General McCarl to the Secretary of War*, 7 Comp. Gen. 507 (1928). And the Office of Legal Counsel has similarly opined that, "[i]n light of the express terms of the Anti-Deficiency Act, . . . there must be an identifiable source of statutory authority to incur an obligation in advance of an appropriation before a settlement [of litigation] may be entered that would incur one." Opinion of the Office of Legal Counsel, *Authority of the United States To Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 1999 OLC LEXIS 10 (1999). Thus, the Anti-Deficiency Act operates in conjunction with the Miscellaneous Receipts Act to preserve Congress' control over the federal purse and the purposes to which public resources are put.

B. Federal Agencies May Not Offer Credits To Induce Expenditures on Behalf of the Government in the Absence of an Appropriation.

This general principle has specifically barred efforts by federal agencies to grant credits or bestow valuable privileges with respect to federal funds and resources, in exchange for goods or services that the agency believed would advance the Government's interests. Such initiatives are illegal because they deprive the Treasury of monies owing to the government as a whole, and they encroach upon Congress' prerogative to decide for itself the value of the goods or services bargained for by the federal agency, and to appropriate funds for that purpose, or not, as it sees fit. In 1955, for example, the Comptroller General considered a proposal by the General Services Administration to adopt a form contract under which food service operators were required to deposit a portion of their revenues into a special fund that would be used to fund replacements or repairs of Government-owned equipment. The Comptroller General ruled that the precursor to the Miscellaneous Receipts Act, as well as the principles animating it, simply would not permit that proposal. *See To the Administrator, General Services Administration*, 35 Comp. Gen. 113 (1955). He explained:

> The wording of this section of the statute is inclusive and admits of but one meaning, namely, that the money shall be deposited to the credit of the Treasurer of the United States for covering into the Treasury to the credit of an appropriation, trust, or special fund (by repay covering warrant) or to the credit of the General Fund of the Treasury, as miscellaneous receipts. The Congress in the enactment of Section 3617 . . . and other applicable laws has clearly indicated an intention to confine the use of funds by officers or agents of the United States for disbursing purposes to the funds advanced on accountable warrant pursuant to the various appropriations acts. The requirement of these statutes is nothing more than in furtherance of the provisions of the Constitution, Article I, Section 9, paragraph 7, that "No money shall be drawn from the Treasury but in consequence of appropriations made by law." Indeed the intent can reasonably be said to appear that all the public monies shall go into the Treasury; appropriations then follow.

Id.

The Comptroller General had no difficulty concluding that the proposed arrangement violated the statute, for the diverted funds were due and owing to the Government as consideration under the concession contracts. By not depositing them in the Treasury, but instead using them to repair or replace Government equipment, the GSA was effectively usurping Congress' power to determine how best to spend public funds. "Accordingly, it must be held that

the contract provisions for the establishment of the reserve for equipment and the payment of a portion of the gross revenue into such reserve are unauthorized. Actions should be taken in your Administration to revise the contracts and contract forms accordingly and to deposit into the Treasury as miscellaneous receipts any amounts now held in the reserve funds." *Id.*

The Comptroller General reached the same determination in 1963 with respect to a proposal by the National Zoo to permit a private charitable organization, the Friends of the National Zoo, to install a coin-operated audio tour system at the Zoo and use the proceeds to finance a teacher-training program and a guidebook to the zoo. *To the Secretary, Smithsonian Institution*, 42 Comp. Gen. 650 (1963). The Comptroller General found that this funding arrangement clearly ran afoul of the Miscellaneous Receipts Act and the Anti-Deficiency Act, both of which were designed to protect the central postulate of the Appropriations Clause: "As all the taxes raised from the people, as well as the revenues from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper that Congress should possess the power to decide how and when any money should be applied for these purposes." *Id*. (quoting Justice Story's Commentaries on the Constitution (5th ed., Vol. 1, p. 222). The Comptroller General expanded upon the underlying separation of powers principles that are at stake:

> Congress has jealously guarded its prerogatives under this clause, and has from time to time by general statute sought to guard against any possibility of encroachment by the executive department. To insure that the executive shall remain wholly dependent upon appropriations it is required (with limited and very specific exceptions) that the gross amount of all monies received from whatever source for the United States be deposited in the Treasury; and that no officer or employee of the United States shall involve the Government in any contract or other obligation for the payment of money for any purpose in advance of appropriations therefore, unless such contract or obligation is authorized by law.

Id. (citations omitted). The Comptroller General made clear that the charitable organization's use of the proceeds from the tour system was the quid pro quo for the permit to operate the tour system on federal property. "We have for many years consistently held that any grant of a right to use Government-owned property or facilities in a manner not permitted to the public at large creates a valuable privilege for which the Government should be compensated, *and should be subject to statutory provisions governing public contracts*." *Id*. (emphasis added).

The Comptroller General's application of these principles in the National Zoo case is highly instructive with respect to the instant issue:

> In light of the above principles and statutory requirements, we feel that the proposed arrangement with the Friends of the National Zoo would be unauthorized, however beneficial and desirable it might be. It would involve a grant to the organization of a concession or privilege which, under our interpretation of the cited provision of the 1932 Act,[11] would be permissible only for a solely monetary consideration; if, on the other hand, a monetary consideration were provided, the money would be required to be deposited in the Treasury and would not be available for the proposed uses unless appropriated therefore by the Congress. . . .
>
> For the reasons stated, we believe that authorization for entering into any such arrangement as proposed should be requested of the Congress.

Id.[12]

Numerous other Comptroller General opinions condemn, for essentially the same reasons, similar arrangements to finance agency initiatives with funds obtained from private entities. *See, e.g., In Matter of*: *Customs Service-Reimbursement for Additional Personnel at Miami International Airport*, 59 Comp. Gen. 294 (1980) ("The Customs Service [may not] use funds received from outside sources to provide for additional customs inspectors to perform clearance functions during regular business hours" because "the collection of funds for clearance services . . . on behalf of the general public would constitute

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[11] The 1932 Act, 40 U.S.C. § 303b, provides that the leasing of Government property "shall be for money consideration only, and there shall not be included in the lease any provision for the alteration, repair, or improvement of such buildings or properties . . . . The money derived from such rentals shall be deposited and covered into the Treasury as miscellaneous receipts."

[12] The Comptroller General also made clear that even if the charitable organization's use of the tour system proceeds were not viewed as the quid pro quo for a Government privilege, the arrangement would nonetheless violate the Anti-Deficiency Act: "Viewed from the other end, the furnishing of the contemplated teacher-training program and guidebook, if not deemed to be consideration for a concession, would amount to voluntary services which could not lawfully be accepted." *Id.*

an augmentation of the appropriations made by Congress for performing such services."); *In the Matter of Donor Payments to Internal Revenue Service for Employee Meeting Attendance Costs*, 55 Comp. Gen. 1293 (1976) ("Absent specific authorizing legislation, there is no authority for an official of the Government to accept on behalf of the United States voluntary donations or contributions of cash since this would constitute an augmentation of appropriations made by Congress to the agency. . . . Any such donations or contributions . . . must be deposited into miscellaneous receipts by the Treasury.") (citing Miscellaneous Receipts Act, *then codified at* 31 U.S.C. § 484); *To the Secretary of Transportation*, 49 Comp. Gen. 476 (1970) (rejecting proposal to provide parking to federal employees in exchange for a fee as a violation of both 40 U.S.C. § 303b, and "as unauthorized . . . use of federal property to help finance the procurement of private services") (citing Miscellaneous Receipts Act, *then codified at* 31 U.S.C. § 484); *see also Contracts with Concessioners in National Parks*, 41 Op. Att'y Gen. 127 (1953) (rejecting National Parks Service proposal to require concessioners, in partial consideration for the privilege of operating in the national parks, to deposit a percentage of their gross receipts in fund that would be utilized by the concessioner, at the direction of the Secretary of the Interior, to make improvements to Government property or to acquire additional facilities and property for the Government; the Attorney General based his opinion on a statute specific to the national parks, and thus declined to reach the question whether this course also violated the Miscellaneous Receipts Act).[13]

The Comptroller General has consistently made clear that the economic substance of the arrangement, not the labels applied by the agency, controls the question whether the agency is circumventing statutory provisions requiring that all consideration due and owing to the Government be deposited in the Treasury, and cannot be expended absent an appropriation by Congress. Thus, in rejecting a National Park Service initiative to require concession contractors to provide maintenance and repair of Government facilities, the Comptroller General pointed out that "the characterization of payments for the use of space and facilities as 'commissions,' 'percentages' or 'franchise fees' certainly should not change the intrinsic character of such payments as *rental paid for the use of Government property*." *To the Secretary of the Interior*, 41 Comp. Gen. 493 (1962) (emphasis in original); *see also To the Secretary of Health, Education, and Welfare*, 41

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[13] Contrary to this consistent line of decisions, the Sixth Circuit anomalously held in 1945, without any meaningful analysis or explanation, that "funds [the War Food Administrator] accumulated by assessment on the handlers of milk are not public funds, but are trust funds to be retained and disbursed by the Market Agent without deposit to the Treasury of the United States." *Varney v. Warehime*, 147 F.2d 238, 245 (6th Cir. 1945).

Comp. Gen. 671 (1962) (rejecting Public Health Service proposal to exchange drugs for dental chairs with the Defense Medical Supply Agency because the "net effect of transferring drugs for dental chairs without replacing the drugs or covering an appropriate amount into the Treasury as miscellaneous receipts is the purchase of chairs for drugs rather than for money").[14]

Likewise, the economic substance of the proposed transaction governs application of the Anti-Deficiency Act. The FCC is proposing to forego the specified auction procedures and the revenues they would generate in order to induce private funding of what Nextel itself has frankly acknowledged are "the FCC's objectives – solving the critical interference problem, providing much-needed additional spectrum for public safety, and doing so at no cost to the Government." Nextel, April 22, 2004 Press Release: *Critical Public Safety Needs Must Be Addressed* (emphasis in original). Of course, there *is* an obvious and inescapable cost to the Government under Nextel's proposal: the billions of dollars in revenue that would otherwise be paid into the Treasury as consideration for the valuable spectrum license that the FCC proposes to award to Nextel. As one commentator has put it: "the anti-deficiency rule . . . prevents unfunded monetary liabilities beyond the amounts Congress has appropriated[,] . . . . prohibiting *any* expenditure beyond the amounts appropriated, even when the unfunded expenditures do not require supplemental appropriations." Kate Stith, *Power of the Congress' Power of the Purse*, 97 Yale L.J. at 1371-72 (1988).[15]

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[14] Most of the authorities discussed in text arose, not surprisingly, in the context of agency proposals to confer property rights upon a private contracting partner, whereas by law, a radio spectrum license merely authorizes "the use of such channels, but not the ownership thereof, by persons for limited periods." 47 U.S.C. § 301; *see also FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("no person is to have anything in the nature of a property right as a result of the granting of a license"). This distinction is irrelevant in this context, for what matters is that the FCC would be bestowing a valuable privilege upon Nextel in the form of an exclusive right to use a public resource that Congress has determined must be employed to benefit the public fisc. Accordingly, the formal conferral of an exclusive license to use spectrum subject to federal control is no less subject to the principles and constraints reflected in the opinions cited above than is the conferral of concessions in national parks or the right to provide tours in the national zoo.

[15] Although Professor Stith observes that "the full implications of the anti-deficiency rule have not been explicitly acknowledged by Congress, executive agencies, or scholars," *id*. at 1372, the import of the authorities cited herein and the principles upon which they are based apply with full force to the Anti-Deficiency Act alongside the Miscellaneous Receipts Act.

Similarly, the Office of Legal Counsel has explained that indemnification agreements are valid under the Anti-Deficiency Act "only [if] the agency could make *any conceivable* expenditure required by the agreement *without creating a deficiency in its appropriated funds*." Opinion of the Office of Legal Counsel, *Indemnification Agreements and the Anti-Deficiency Act*, 1984 OLC LEXIS 28 (1984). Of course, a $800 million payment by the FCC to public safety licensees to cover their relocation costs would greatly exceed the FCC's appropriated discretionary funds. Accordingly, given that every dollar spent by Nextel for this purpose would in truth be funded by the FCC in the form of a credit against money that Nextel would otherwise have paid for its spectrum license, it is patently clear that the proposed funding arrangement would violate the letter of the Anti-Deficiency Act.

Nor can the pressing importance of the public safety concerns that animate this proposal obviate the limitations of the Anti-Deficiency Act. The Comptroller General recently ruled that the Act had been violated by unauthorized withdrawals of $60 million from the District of Columbia General Fund in order to provide "advances" to the District of Columbia Health and Hospitals Public Benefit Corporation ("PBC"). *See Anti-Deficiency Act Violation Involving the District of Columbia Health and Hospitals Public Benefit Corporation*, 2000 U.S. Comp. Gen. LEXIS 231 (2000). Though the District claimed that PBC needed the funds for "emergencies involving the safety of human life," the Comptroller General determined that "it would be a novel proposition, one that we are unwilling to endorse, to conclude that an agency's failure to manage and live within the resources provided for an activity involved in protecting human life permits it to incur obligations in excess of the amounts provided." *Id*. at *5. To accept such a claim not only would disturb the bedrock obligation of "PBC (and similarly situated federal entities) to manage its resources and stay within the authorized level," it also "would nullify the oversight and control provided by the appropriation process and would provide the PBC with unlimited authority to fund its operations." *Id*. at *25-*26. It followed that "the District and the PBC are not authorized to incur obligations in excess of the amounts appropriated for the PBC, and a reportable violation of the Antideficiency Act therefore has occurred." *Id*. at *6.

In short, if the laudable public safety purposes cited by Nextel are persuasive to Congress, then appropriations or statutory accommodations can be made available to serve them. The FCC simply lacks authority to craft, authorize, and fund its own legislative solution at the expense of the United States Treasury without the approval of Congress.

II. THE FCC MAY NOT ABANDON COMPETITIVE BIDDING PROCEDURES SO AS TO LICENSE VALUABLE SPECTRUM TO NEXTEL IRRESPECTIVE OF THE VALUE THAT SPECTRUM WOULD OTHERWISE COMMAND.

The Nextel proposal is directly contrary to the specific statutory requirement that the license at issue be sold at public auction and the proceeds deposited in the Treasury. *See* 47 U.S.C. § 309(j). By refusing to conduct the auction, and instead designating Nextel as the licensee for below market consideration, the FCC is designedly obtaining *less* consideration than it would obtain if it had accepted the $5 billion bid that Verizon has pledged to make. This is obviously contrary to the public auction procedure that Congress has statutorily prescribed, and to the ultimate interest of the United States Treasury. Even assuming that the proceeds from the exchange of this license were available for the FCC to do with as it sees fit, its conscious decision to abandon the auction procedures seems calculated to favor private interests over public ones.

In *Comptroller General McCarl to the Secretary of the Navy*, 7 Comp. Gen. 806 (1928), the Comptroller General instructed that "the privilege of operating the laundry [aboard a Navy ship], which would appear to be quite valuable to the holder of the lease, should be let to the highest responsible bidder after due competition, and the rent accruing there from should be deposited and covered into the Treasury as miscellaneous receipts, in accordance with Section 3617, revised statutes." *Id*. And in *Acting Comptroller General Elliott to the Secretary, Smithsonian Institution*, 19 Comp. Gen. 887 (1940), the Comptroller General instructed that it was improper for the National Zoological Park to have awarded a new contract to the present concessionaire without relying upon a competitive bid process:

> The policy of the Government in the matter of requiring advertising and competition in the letting of all Government contracts -- regardless of whether the subject matter of the contract is to be acquired or disposed of -- except where otherwise specifically provided by statute, is now well established by legislative enactments and in decisions of the courts and accounting officers. While it is not required that concessions be let to the highest bidder without regard to other considerations, such as the responsibility of the highest bidder, the convenience of the public, etc., these considerations are not so paramount as to justify the exclusion of efforts to secure the best prices obtainable by inviting bids therefore with appropriate stipulations as to what will be required of bidders. Where, after advertising and competition has been had, it is the view of the Administrative Office concerned that the

> concession should be awarded to other than the highest bidder, the matter should be submitted to this office before an award is made with a complete report as to the facts involved and the reasons for proposing to accept other than the highest bid.

Id.

Though it might ultimately award a new contract to the current concessioner based on considerations other than price, "a true comparison of the value of the financial return from the concession with the value of other considerations which are involved can be made only after the maximum financial return has been determined by advertising for bids. . . . The acceptance of [the incumbent's] proposal to operate the restaurant for the fiscal year 1941 at the price stated in his present agreement, plus the expense of moving into the new building, without first ascertaining that no other prospective concessionaire would pay a higher price, is not authorized." *Id*.

Surely these same considerations must hold here, especially given that the FCC is effectively foregoing hundreds of millions, if not billions, of dollars in extra consideration that Verizon, and perhaps other bidders, would be willing to provide in the event that a public auction were held, as specified by Section 309(j). The FCC's failure to capture this market value for the benefit of the public is tantamount to a failure to transfer to the Treasury those funds to which the Government would otherwise be entitled. It also constitutes an effective outlay of funds from the United States to Nextel, in the form of a gratuitous discount. There can be no doubt that the FCC would here be costing the United States valuable consideration that would otherwise be obtained for the spectrum through the specified auction procedures, as Verizon is prepared to open the bidding at $5 billion -- apparently substantially more than the total consideration being offered under anyone's account of the Nextel proposal.

Furthermore, in light of the fact that the FCC has the regulatory authority to require that Nextel clean up the spectrum in which interference has occurred, the circumstances here are such that the FCC would essentially be providing something for nothing. In an analogous situation where the Assistant Secretary of the Army sought approval of a contract purporting to pay for fire protection to which the government was already independently entitled, the Comptroller General rejected the legality of the contract. *See To the Secretary of the Army*, 35 Comp. Gen. 311 (1955). "[I]t seems clear that the United States is entitled to the same fire protection for its property within the district as are property owners who pay taxes. . . . In the absence of any statutory provision to the contrary, there is no authority to enter into a contract for payment of any amount in lieu of taxes, such a contract being in derogation of the government's sovereign immunity from taxes." *Id.* Neither should the FCC here be making gratuitous

payments at the direct expense of the United States and to the enormous windfall of private parties such as Nextel.

CONCLUSION

For the foregoing reasons, the spectrum license transaction proposed by Nextel would contravene the specific statutory requirement that spectrum be sold at public auction and, irrespective of this provision, would violate both the Anti-Deficiency Act and the Miscellaneous Receipts Act.

Charles J. Cooper

Exhibit A

Critical Public Safety Needs Must Be Addressed

04-22-04 04:41 PM EST | RESTON, Va. --(BUSINESS WIRE)--

Nextel Communications Inc. (NASDAQ: NXTL) today submitted a letter to the Federal Communications Commission ("FCC") in support of the Consensus Plan that solves the critical problem of public safety interference. Filed in WT Docket 02-55, Improving Public Safety Communications in the 800 MHz Band, Nextel's letter highlights numerous technical and legal reasons why the FCC cannot substitute replacement spectrum at 2.1 GHz for the 1.9 GHz spectrum identified in the Consensus Plan. The letter also highlights a number of fundamental problems with Verizon's purported offer to bid $5 billion for 10 MHz of spectrum at 1.9 GHz.

As part of the Consensus Plan, Nextel has committed to funding public safety and private wireless relocation costs and surrendering spectrum rights to facilitate the realignment process and to provide public safety much-needed additional spectrum. In return for its substantial contributions, Nextel must be made whole with replacement spectrum. In Nextel's original filing in November 2001, Nextel identified possible replacement spectrum at 2.1 GHz; however, when the FCC issued its Notice of Proposed Rulemaking in March 2002, it proposed replacement spectrum in the 1.9 GHz band, among other alternatives.

After months of negotiations among public safety participants, private wireless interests and Nextel, the Consensus Plan included assigning to Nextel 10 MHz at 1.9 GHz in return for Nextel making the financial and spectral contributions necessary to implement 800 MHz realignment and eliminate public safety interference. In the more than 18 months since the Consensus Plan was filed at the FCC, all possible technical, legal, economic and other factors concerning granting Nextel replacement spectrum at 1.9 GHz have been extensively evaluated and considered in the exhaustive record of this proceeding.

In contrast, the record contains no discussion of the technical, legal, economic and policy issues surrounding substituting 2.1 GHz channels (2020 - 2025/2170 - 2175 MHz) for 1.9 GHz spectrum as part of the spectrum swap necessary to implementing 800 MHz realignment. Nextel's letter states that the limited information available indicates that using 2.1 GHz would require clearing not only Broadcast Auxiliary Service incumbents but nearly 1,000 Fixed Microwave licensees in the 2170 - 2175 MHz channel block, significantly higher network deployment costs, higher handset development costs, and possible interference between and among mobile users of the 2.1 GHz spectrum and existing adjacent licensees. For example, in an April 2003 FCC filing, Verizon Wireless stated, "there is no optimal band pairing arrangement available for the 2020-2025 MHz band that would make it particularly suitable for (advanced wireless services)."

These many issues remain undeveloped and unresolved; the time needed to fully explore and resolve them would unacceptably delay the comprehensive interference solution public safety demands and deserves - and which has already awaited FCC action for more than two years. Further delay would benefit only those who seek to derail for their own economic interests the Commission's only solution to the public safety interference problem.

Verizon's purported $5 billion bid for spectrum at 1.9 GHz also does nothing to further the interests of public safety in this critical proceeding. It would do nothing to achieve the FCC's objectives - solving the critical public safety interference problem, providing much-needed additional spectrum for public safety and doing so at no cost to the government. In at least eight different positions that Verizon has articulated throughout this proceeding, it has yet to offer a single proposal that would realize even one of the Commission's public interest goals.

Verizon contends that the FCC must auction replacement spectrum in this proceeding to provide revenue to the U.S. Treasury. Yet, in an October 2002 filing, Verizon stated, "the Commission's primary concerns in auction matters cannot be the generation of revenue to the Treasury." Verizon also understands that auction receipts could not legally be used to benefit the public safety community. If Verizon's position were adopted, police, fire and EMS officials would be left without a solution and would continue to struggle with interference hindering their operations and putting lives at risk.

First and foremost, this proceeding is about eliminating a potentially life-threatening danger to our nation's first responders - public safety radio interference. The Consensus Plan is the only solution that achieves that objective.

About Nextel

Nextel Communications, a FORTUNE 200 company based in Reston, Va., is a leading provider of fully integrated wireless communications services and has built the largest guaranteed all-digital wireless network in the country covering thousands of communities across the United States. Today 95 percent of FORTUNE 500(R) companies are Nextel customers. Nextel and Nextel Partners, Inc. currently serve 294 of the top 300 U.S. markets where approximately 251 million people live or work.

"Safe Harbor" Statement under the Private Securities Litigation Reform Act of 1995. A number of the matters and subject areas discussed in this press release that are not historical or current facts deal with potential future circumstances and developments, including our belief as to whether the FCC will approve the Consensus Plan, which is qualified by the inherent risks and uncertainties surrounding any such future expectations described from time to time in Nextel reports filed with the SEC, including Nextel's annual report on Form 10-K for the year ended December 31, 2003. This press release speaks only as of its date, and Nextel disclaims any duty to update the information herein.

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Exhibit B

1 of 1 DOCUMENT

The Washington Post

June 24, 2004 Thursday
Final Edition

SECTION: Financial; E01

LENGTH: 871 words

HEADLINE: FCC Chairman Sides With Nextel on Disputed Airwaves

BYLINE: Yuki Noguchi, Washington Post Staff Writer

BODY:

Federal Communications Commission Chairman Michael K. Powell has decided to support a plan giving Nextel Communications Inc. rights to cellular frequencies that the mobile-phone company wants, according to sources familiar with the decision.

The move marks a crucial victory for Reston-based Nextel, which has been lobbying for the airwaves in the 1.9-gigahertz frequency range, although the FCC is still determining what the company should pay in return. The decision involves airwaves worth billions of dollars and is critical to Nextel's future.

It's a bitter setback for Nextel's cellular-industry rivals, led by Verizon Wireless and Cingular Wireless, which have vowed to go to court to block Nextel from taking control of the disputed airwaves.

Powell's decision was described by sources at the agency and in the industry who declined to comment publicly until the FCC chief announces his stance.

Powell appears likely to win approval from the full commission: Three of the five commissioners backed Nextel's position in an initial vote in April, and sources said the commissioners are seeking unanimous agreement.

Nextel, which has 13.4 million subscribers, now carries phone calls using slivers of airwaves interspersed with frequencies used to carry police and fire dispatch calls. That tangled setup often causes public safety radios to go fuzzy or drop calls.

New airwaves would reduce the interference, while making Nextel a much stronger competitor in the cutthroat wireless industry because it could carry more cellular and Internet traffic.

"We have been focused on this problem from one perspective, how to fix the interference problem for public safety. And to do it in a way that doesn't provide an excessive windfall to any one company but gets the problem solved," Powell said yesterday on CNBC's "Kudlow & Cramer" program. "We believe we have come close to figuring out how to do that, and we'll get that decision out to the market soon."

To make its case before regulators and Congress, Nextel hired a dozen lobbyists -- including former high-ranking congressional and FCC staffers -- and spent the past 21/2 years trying to persuade the commission to accept its plan. It periodically sweetened the deal by offering to pay more money and give up more of its existing airwaves. In recent weeks, the company took a hard-line stance, telling the FCC it would mount its own legal challenge if it didn't receive the airwaves it wanted.

Still, the commission isn't prepared to hand Nextel a wholesale victory. How much Nextel will have to pay -- both to help relocate public-safety groups to less congested airwaves and to compensate for Nextel's new airwaves -- is still under negotiation, according to sources familiar with those discussions. A final decision appears likely in early or mid-July.

Representatives from Nextel and Verizon Wireless and FCC spokeswoman Lauren Patrich declined to comment on the issue.

Nextel has offered to pay $850 million in cash to relocate public-safety users and other private carriers to clearer airwaves. In addition, it has agreed to absorb the $512 million cost of moving existing occupants of the airwaves it desires. This month, the company also agreed to give up some additional airwaves to boost the total value of its exchange, which the company maintains is now worth more than $5 billion.

Nextel's big cellular rivals launched an aggressive campaign against Nextel's plan. Verizon Wireless and Cingular, the nation's number one and two cellular phone providers, have said Nextel is trying to game the regulatory system to lay claim to airwaves.

Verizon Wireless argued that Nextel should not be rewarded for helping to create the interference problem and said the FCC should auction off the airwaves as the commission has done in other cases for the last decade.

As an alternative, the company argued Nextel should be required to pay $3 billion to public safety agencies and receive less valuable airwaves at a higher frequency where cellular carriers don't currently operate. That would require Nextel to spend more for development of new technology.

Some prominent politicians have objected to Nextel's plan as a windfall for the company. House Budget Committee Chairman Jim Nussle (R-Iowa) plans to introduce a measure tomorrow barring the FCC from granting airwaves except through an auction, a committee spokesman confirmed.

In March, the FCC appeared close to an agreement. The commission's wireless bureau recommended Nextel pay $1.3 billion to $1.5 billion more than it proposed, and later three of the commissioners -- including Powell -- voted to grant Nextel the 1.9 gigahertz spectrum.

Since then, Nextel has offered to pay to move broadcasters off of the airwaves it wants, and it has offered to hand over additional airwaves to public safety. But the company has not publicly responded to the FCC staff's recommendation that it pay more.

After some members of the FCC commissioners' staff and Nextel's rivals proposed offering alternate airwaves, the commission staff reopened the debate. Powell pulled his vote, effectively giving the regulators more time to consider their options.

Nextel's stock closed yesterday at $26.81, up 85 cents a share.

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